NO. 05-19-00034-CR

**IN THE
COURT OF APPEALS
5TH JUDICIAL DISTRICT
DALLAS, TEXAS**

JUAN CARLOS FLORES, Appellant

v.

THE STATE OF TEXAS, Appellee

**ON APPEAL IN CAUSE NUMBER
069074
FROM THE 15TH DISTRICT COURT
OF GRAYSON COUNTY, TEXAS
HON. JIM FALLON, presiding**

APPELLEE'S BRIEF

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ORAL ARGUMENT REQUESTED

LIST OF PARTIES

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APPELLEE:

THE STATE OF TEXAS

ATTORNEY FOR THE STATE:

ON APPEAL	ELECTED OFFICIAL	AT TRIAL
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JUAN CARLOS FLORES, Appellant

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THE STATE OF TEXAS, Appellee

TO THE HONORABLE COURT OF APPEALS:

COMES NOW THE STATE OF TEXAS, hereinafter referred to as the State, and submits this brief pursuant to the Texas Rules of Appellate Procedure and would show through her attorney the following:

ISSUES PRESENTED

RESPONSE POINT 1:

THE EVIDENCE ADDUCED AT TRIAL WAS SUFFICIENT TO SUPPORT THE JURY'S FINDING THAT THE APPELLANT USED OR EXHIBITED A DEADLY WEAPON DURING AN AGGRAVATED ROBBERY.

RESPONSE POINT 2:

THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE COLLECTED FROM THE APPELLANT'S RESIDENCE BECAUSE THAT EVIDENCE WAS LEGALLY SEIZED UNDER THE PLAIN VIEW DOCTRINE.

SUMMARY OF ARGUMENT

The appellant incorrectly alleges in his brief that the possibility the drill could be used in a way that might cause death or serious bodily injury is not sufficient to show the drill was used in a way that could cause death or serious bodily injury. A deadly-weapon finding for a felony offense must prove that the weapon, if not a *per se* a weapon, was capable of causing death or serious bodily injury *and* must contain some facilitation connection between the weapon and the felony.

The record clearly reflects that the drill was "capable" of causing death or serious bodily injury. There was credible testimony that a drill was a deadly weapon because it could be used to bludgeon a person, stab a person, or "drill" a person, and could cause death or seriously bodily injury. The record reflects that the appellant made threats to the victim while holding the drill, pointed the drill at the victim, and shook the drill and was clearly displayed in a manner to threaten the victim. The factfinder could rationally conclude that the drill capable of causing death or seriously bodily

injury and was used or exhibited during the criminal transaction. The evidence is sufficient to prove the determining factor that the deadly weapon was used or exhibited in facilitating the underlying crime.

In his second ground, the appellant alleges that the trial court should have suppressed the items seized from the appellant's residence because the search of the home exceeded the scope of the consent and because it was not immediately apparent that the drill and the bags found near the drill were evidence of a crime.

Detective Mackay received clear consent to search the appellant's residence from his wife, Isabel Sanchez. Once lawfully inside the residence, the detective observed items which were immediately apparent and the detective had probable cause to believe that a drill and plastic bags similar to those observed on a video of the Aggravated Robbery, found in the home of the man who had been identified as the suspect of the Aggravated Robbery, and found in close proximity to each other, were evidence of the crime in this case. The trial court did not err in denying the appellant's motion to suppress.

ARGUMENT

RESPONSE POINT 1:

THE EVIDENCE ADDUCED AT TRIAL WAS SUFFICIENT TO SUPPORT THE JURY'S FINDING THAT THE APPELLANT USED OR EXHIBITED A DEADLY WEAPON DURING AN AGGRAVATED ROBBERY.

The appellant incorrectly alleges in his brief that "the possibility the drill could be used in a way that might cause death or serious bodily injury is not sufficient to show the drill was used in a way that could cause death or serious bodily injury." (Appellant's Brief, p. 12) Under the appellant's argument, a defendant would have to cause or attempt to cause actual serious bodily injury or death before an object, other than a firearm, could ever be considered a deadly weapon. That is not the law.

A. DEFINITION OF DEADLY WEAPON

A robbery becomes an aggravated robbery, as charged in this case, if the actor "uses or exhibits a deadly weapon." Tex. Pen. Code Ann. § 29.03(a)(2) (West). An object can be a deadly weapon by design, under Tex. Pen. Code Ann. § 1.07(a)(17)(A) (West). "Deadly weapon" is defined as follows:

(A) a firearm or anything manifestly designed, made, or adapted for

the purpose of inflicting death or serious bodily injury; or

(B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

Tex. Pen. Code Ann. § 1.07(a)(17)

B. DEFINITION OF "USE" AND "EXHIBIT" REGARDING A DEADLY WEAPON

A person "uses or exhibits a deadly weapon" under the aggravated robbery statute if he employs the weapon *in any manner* that "facilitates the associated felony." *Patterson v. State*, 769 S.W.2d 938, 941 (Tex. Crim. App. 1989). The courts must interpret a statute in accordance with the plain meaning of its language, unless the language is ambiguous or the plain meaning leads to absurd results that the Legislature could not possibly have intended. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991)

"Use" and "exhibit" are not synonymous. Each word describes a different types of conduct. The Court of Criminal Appeals has held that "use" is commonly employed to describe conduct in which the verb's object, again, in this case a deadly weapon, is utilized in order to achieve a purpose. In other words, the deadly weapon must be utilized, employed, or applied in order to achieve its intended result: "the commission of a felony

offense or during immediate flight therefrom." *Patterson*, 769 S.W.2d at 940–41. Conversely, "exhibit" only requires that a deadly weapon be consciously shown, displayed, or presented to be viewed during "the commission of a felony offense or during immediate flight therefrom." *Patterson*, 769 S.W.2d at 940–41. Thus, "used ... a deadly weapon" during the commission of the offense means that the deadly weapon was employed or utilized in order to achieve its purpose and "exhibited a deadly weapon" means that the weapon was consciously shown or displayed during the commission of the offense. *Patterson*, 769 S.W.2d at 940–41.

Objects used to threaten deadly force are in fact deadly weapons. *McCain v. State*, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000) The statute does not say "anything that in the manner of its use or intended use *causes* death or serious bodily injury." Instead the statute provides that a deadly weapon is "anything that in the manner of its use or intended use is *capable* of causing death or serious bodily injury." Tex. Pen. Code Ann. § 1.07(a)(17)(B)(West) (emphasis added). The provision's plain language does not require that the actor actually intend death or serious bodily injury or cause or attempt to cause death or serious bodily injury. An object is a deadly weapon if the actor intends a use of the object in which it would be capable of causing death or serious bodily injury. The placement of the

word “capable” in the provision enables the statute to cover conduct that threatens deadly force, even if the actor has no intention of actually using deadly force. *See McCain*, 22 S.W.3d at 500–03; *Tisdale v. State*, 686 S.W.2d 110, 114–115 (Tex. Crim. App. 1984).

Thomas, cited by the defense, contains language that is somewhat misleading when it states that certain objects are not deadly weapons “unless actually used or intended to be used in such a way as to cause death or serious bodily injury within the meaning of Section 1.07(a)(11)(B).” *Thomas v. State,* 821 S.W.2d at 620. A closer reading of the opinion shows that the Court was simply making a shorthand reference to subsection (B)' s requirement while the Court focused upon the applicability of subsection (A). The modifying phrase “within the meaning of Section 1.07(a)(11)(B)” requires us to refer back to the statutory text to determine the full meaning of that passage. A subsequent paragraph in the opinion rectifies this omission by including the word “capable” in its discussion. 821 S.W.2d at 620.4

789.

C. EVIDENCE IS SUFFICIENT TO PROVE THE USE OR EXHIBITION OF A DEADLY WEAPON IN THIS CASE

For legal sufficiency purposes, the question is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (emphasis in original). A deadly-weapon finding for a felony offense must prove that the weapon, if not a *per se* a weapon, was capable of causing death or serious bodily injury *and* must contain some facilitation connection between the weapon and the felony. The deadly weapon must, in some manner, help facilitate the commission of the felony.

The record clearly reflects that the drill was "capable" of causing death or serious bodily injury. The appellant threatened to "hurt" the victim in this case while brandishing a hand-held drill covered in a plastic bag. (RR vol. 4, pp. 146, 148; vol. 5, pp. 44-45) Sergeant Brian Conrad, with the Denison Police Department, testified that a drill was a deadly weapon because it could be used to bludgeon a person, stab a person, or "drill" a person, and could cause death or seriously bodily injury. (RR vol. 4, pp. 147-148) Detective Kyle Mackay, who found State' exhibit 31 in the appellant's residence, also testified that the drill was capable of causing death or serious bodily injury either as a blunt object, to stab a person, or the "drill" a

person. (RR vol. 5, pp. 48-49)

The remaining question, then, is whether the drill was "used or exhibited" during the criminal transaction. It was. The record reflects that the appellant made threats to the victim while holding the drill, pointed the drill at the victim, and shook the drill. (RR vol. 4, pp. 127- 129; vol. 5, p. 81; SX 1) The deadly weapon was clearly displayed in a manner intended to place the victim in fear to facilitate the robbery. (RR vol. 5, p. 88; SX 1) The factfinder could rationally conclude that the drill was exhibited during the criminal transaction, or at least, that its presence was used by the appellant to instill in the complainant apprehension, reducing the likelihood of resistance during the encounter.

The appellant did not merely possess the drill under Tex. Pen. Code Ann. § 29.03(a)(2). Rather, the evidence is sufficient to prove the determining factor that the deadly weapon was used or exhibited in facilitating the underlying crime. *McCain*, 22 S.W.3d at 503; *See Patterson*, 769 S.W.2d at 941.

RESPONSE POINT 2:

THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE COLLECTED FROM THE APPELLANT'S RESIDENCE BECAUSE THAT EVIDENCE WAS LEGALLY SEIZED UNDER THE PLAIN VIEW DOCTRINE.

In his second ground, the appellant alleges that the trial court should have suppressed the items seized from the appellant's residence because the search of the home exceeded the scope of the consent and because it was not immediately apparent that the drill and the bags near the drill were evidence of a crime.

A. STANDARD OF REVIEW

The appellate courts review a trial court's ruling on a motion to suppress under a bifurcated standard of review. *See Ford v. State*, 158 S.W.3d 488, 493 (Tex. Crim. App. 2005); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

First, the courts afford almost total deference to a trial judge's determination of historical facts. *See Guzman*, 955 S.W.2d at 89. The trial judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000). He is entitled to believe or disbelieve all or part of the witness's testimony—even if that testimony is uncontroverted—because he has the opportunity to observe the witness's demeanor and appearance.

Id. If the trial judge makes express findings of fact, the courts view the evidence in the light most favorable to his ruling and determine whether the evidence supports these factual findings. *State v. Kelly*, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006). When findings of fact are not entered, the courts "must view the evidence 'in the light most favorable to the trial court's ruling' and 'assume the trial court made implicit findings of fact that support its ruling as long as those findings are supported by the record.' " *See Harrison v. State*, 205 S.W.3d 549, 552 (Tex. Crim. App. 2006) (quoting *Ross*, 32 S.W.3d at 855); *see also Kelly*, 204 S.W.3d at 819.

Second, the courts review a trial court's application of the law of search and seizure to the facts de novo. *See Wiede v. State*, 214 S.W.3d 17, 25 (Tex. Crim. App. 2007); *Kelly*, 204 S.W.3d at 818. The courts will sustain the trial court's ruling if that ruling is "reasonably supported by the record and is correct on any theory of law applicable to the case." *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006).

B. PLAIN VIEW EXCEPTION TO THE WARRANT REQUIREMENT WAS SUPPORTED BY THE EVIDENCE IN THIS CASE

For the plain view exception to the warrant requirement to attach, two requirements must be met: 1) the officer must be in a proper position to

view the item or lawfully be on the premises; and 2) the fact that the officer has discovered evidence must be immediately apparent. *Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990).

1. DETECTIVE MACKAY WAS LEGALLY ON THE PREMISES

Detective Mackay was legally on the premises. The detective received the report for an Aggravated Robbery which occurred on September 4, 2017. (RR vol. 3, pp. 5-6) A tip was called into the department naming the appellant as the suspect. (RR vol. 3, pp. 7-8) Detective Mackay went to the appellant's address to speak with him on two occasions. (RR vol. 3, p. 8) On the second attempt to make contact with the appellant, Detective Mackay made contact with the appellant's wife, Isabel Sanchez. (RR vol. 3, p. 8) Mrs. Sanchez was able to communicate with the detective in English and granted permission for the detective to check and see if the appellant was in the house. (RR vol. 3, pp. 8-9)

The trial court observed the body camera video recording wherein the appellant's wife gave consent to the detective to search the house for the appellant. (RR vol. 3, pp. 9-10; SX 2) The appellant's attempt to split hairs by stating that consent to "look around" was not the same as consent to

"search the premises" notwithstanding, the appellant's wife clearly consented to Detective Mackay's entry in to the house to search for the appellant.

2. THE EVIDENCE SEIZED BY DETECTIVE MACKAY WAS IMMEDIATELY APPARENT

Detective Mackay had reviewed the initial report and watched the video seized from the convenience store which had been robbed on September 4, 2017. (RR vol. 3, p. 6) Detective Mackay observed the suspect brandishing what the victim had believed to be a gun on that video, and determined that it appeared to be a power drill with a bit attached to the end wrapped in plastic. (RR vol. 3, p. 7)

After receiving consent from Isabel Sanchez to search the appellant's residence for the appellant, Detective Mackay walked through the house looking for the appellant or any evidence of the crime which might be in plain view. (RR vol. 3, pp. 10-11) While walking through the house, the detective observed a drill and two sacks which could have been the wrapped power drill used in the aggravated robbery. (RR vol. 3, pp. 11-12) The drill was located on an open bookshelf with a bag next to it and the other bag was found on the floor in an open closet – all in plain view. (RR

vol. 3, pp. 11, 14-16) Detective Mackay testified that as soon as he saw the drill and sacks he knew they were items which matched what was in the security video. (RR vol. 3, p. 13)

The Supreme Court has construed "immediately apparent" to mean simply that the viewing officers must have probable cause to believe an item in plain view is contraband before seizing it. *State v. Dobbs*, 323 S.W.3d 184, 189 (Tex. Crim. App. 2010)(referencing *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993) ("If ... the police lack probable cause to believe that an object in plain view is contraband without some further search of the object—i.e., if its incriminating character is not immediately apparent—the plain view doctrine cannot justify its seizure."). The Supreme Court articulated the rule that the focus is whether the officer has probable cause to believe that the evidence discovered is associated with criminal activity. *Joseph v. State*, 807 S.W.2d 303, 308 (Tex. Crim. App. 1991). So long as the probable cause to believe that items in plain view constitute contraband arises while the police are still lawfully on the premises, and their "further investigation" into the nature of those items does not entail an additional and unjustified search of (i.e., a greater physical intrusion than originally justified), or presence on (i.e., a longer intrusion than originally justified), the premises, there is no Fourth

Amendment violation. Supreme Court precedent does not dictate that we construe "immediately apparent" necessarily to mean "quickly apparent." Rather, "immediately apparent" in this context means without the necessity of any further search. *Dobbs*, 323 S.W.3d at 189.

In this case the drill and the plastic bags seized were out in the open. The department had received a tip naming the appellant as the suspect. Detective Mackay had recently viewed the video of the Aggravated Robbery and recognized the drill a being like that used in the video. This identification was bolstered by the close proximity to the drill of two plastic bags which were similar to those wrapping the drill on the video.

C. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE SEIZED BY DETECTIVE MACKAY DURING A CONSENT SEARCH WHERE THE EVIDENCE WAS SEIZED PURSUANT TO THE PLAN VIEW DOCTRINE.

Detective Mackay received clear consent to search the appellant's residence from his wife, Isabel Sanchez. Once lawfully inside the residence, the detective observed items which were immediately apparent and the detective had probable cause to believe the items were evidence of the crime he was investigating. The detective had probable cause to believe that a drill and plastic bags similar to those observed on a video of

the Aggravated Robbery, found in the home of the man who had been identified as the suspect of the Aggravated Robbery, and found in close proximity to each other, were evidence of the crime in this case. The trial court did not err in denying the appellant's motion to suppress.

PRAYER

WHEREFORE, the state respectfully prays this court affirm the judgment and conviction herein.

Respectfully Submitted,
J. BRETT SMITH
CRIMINAL DISTRICT ATTORNEY

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ATTORNEY FOR THE STATE

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion was eserved, faxed or mailed to:

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attorney of record for the Appellant, in accordance of the Rules of Appellate Procedure, on JULY 17, 2019.

/s/ *Karla R. Baugh*

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STATE'S CERTIFICATE OF COMPLIANCE

I certify that this document complies with the typeface and word limit requirements of the Texas Rules of Appellate Procedure. This document contains 3,120 words, exclusive of the caption, the identity of parties and counsel, the statement regarding oral argument, the table of contents, the index of authorities, the statement of the case, the statement of issues presented, the statement of jurisdiction, the statement of procedural history, the signature, the proof of service, the certification, the certificate of compliance, and the appendix.

/s/ *Karla R. Baugh* JULY 17, 2019
date

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